Editor's note: Appealed -- dismissed (settled), Civ.No. 84-238 (ED Ken. May 13, 1987)

SHAMROCK COAL CO., INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 83-633 Decided June 28, 1984

Appeal from a decision of Administrative Law Judge David Torbett, denying application for temporary relief from Notice of Violation No. 83-81-111-1.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

   A party seeking temporary relief from enforcement action by the Office of Surface Mining Reclamation and Enforcement must show a substantial likelihood that the findings and decision of the Administrative Law Judge in the matter to which the application relates will be favorable to the applicant.

2. Regulations: Force and Effect as Law

   Duly promulgated regulations have the force and effect of law and are binding on the Department.

3. Regulations: Applicability -- Surface Mining Control and Reclamation Act of 1977: State Program: Generally
   Where a Departmental regulation governing surface mining provides that no change to state laws or regulations shall be effective for purposes of a state program until approved by the Department as an amendment, new state laws governing surface coal mining reclamation requirements may not be implemented until such approval is given.

APPEARANCES: Neville Smith, Esq., Manchester, Kentucky, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Shamrock Coal Company, Inc. (Shamrock), appeals from a decision dated April 15, 1983, by Administrative Law Judge David Torbett, denying application for temporary relief from Notice of Violation (NOV) No. 83-81-111-1, issued by the Office of Surface Mining Reclamation and Enforcement (OSM) on March 31, 1983. Judge Torbett ruled that it is highly unlikely that Shamrock will prevail in the case when it is finally determined by the Secretary.

Shamrock is the permittee of a dormant coal mining project in Perry County, Kentucky. A permit for the site was originally issued to Tesoro Coal Company, which conducted a contour surface mining operation at the site until June 1982. An unreclaimed feature of Tesoro's activities is a highwall ranging from 150 to 200 feet in height and approximately 3,000 feet in length. Shamrock's successor permit for this site was approved on February 4, 1983. 1/ The current permit does not authorize the further mining of any coal from the highwall area. Rather, the area is designated for disposal of spoil generated by mountaintop removal in mining coal from an adjacent area (Tr. 18).

By letter dated September 27, 1982 (Exh. R-7), Shamrock requested a reclamation deferment for the area from the Commonwealth of Kentucky. The two proffered reasons for the request were (1) "instability of the coal market," and (2) the fact that the coal has to be "cleaned" to meet shipping standards under appellant's contracts for which Shamrock proposed to build an addition to its preparation plant. The Commonwealth of Kentucky, Department for Surface Mining Reclamation and Enforcement (KDSM), approved the request and on November 23, 1982, issued a reclamation deferment which was to expire on April 1, 1983 (Exh. R-2).

OSM inspector Charles Saylor inspected the site on February 16, 1983, pursuant to an OSM study of unreclaimed mining sites granted deferment by KDSM (Tr. 29-30). Following his inspection, Saylor issued a 10-day notice (Exh. R-1) to KDSM on March 1, 1983, stating that the minesite was in violation of 405 Ky. Admin. Regs. (KAR) 1:260 (1980) by violating contemporaneous reclamation requirements. 2/ KDSM responded on March 21, 1983, with a statement that, although the Department of the Interior had not approved amendments to Ky. Rev. Stat. (KRS) § 350.093 (1980) and 405 KAR 16:020 (1980), KDSM was bound by the amended version of State law and considered as valid the reclamation deferment granted Shamrock pursuant to the amended statute (Exh. A-6).

1/ Based on testimony at the hearing, it appears that Shamrock assumed control of the mining site in June 1982 (Tr. 62).

2/ 405 KAR 1:260 (1980), section 2(3), requires in instances of contour mining that "[c]oal removal in a given location shall be completed within sixty (60) calendar days after the initial surface disturbance in that location. Backfilling and grading to approximate original contour shall follow coal removal by not more than sixty (60) calendar days and by not more than 1,500 linear feet."

Upon receipt of KDSM's refusal to bring enforcement action against the violation, Saylor issued NOV No. 83-81-111-1 (Exh. R-3). He particularly cited violations of "KRS 350.093, 1980 Acts" and "405 KAR 1:260 Sections (1), (2), and (3)." Later he modified the NOV to define the area of violation as the 3,000 feet of highwall remaining exposed.

On April 4, 1983, Shamrock petitioned the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for review of the NOV and for temporary relief from it. A hearing on the issue of temporary relief only was conducted by Judge Torbett on April 7, 1983, in London, Kentucky.

His decision to deny temporary relief was rendered on April 15, 1983, following the hearing and subsequent briefing. Shamrock appeals this decision pursuant to 43 CFR 4.1267.

In its statement of reasons, Shamrock contends that when the 1982 amendments of KRS 350.093 and its implementing regulation, 405 KAR 16:020E, were not approved by the Secretary within 6 months after receipt, they automatically became part of Kentucky's permanent program. Further, appellant argues that OSM could not properly issue a NOV since it failed to follow the applicable enforcement procedures. Based on these arguments, Shamrock asserts it was not in violation of any federally enforceable act or regulation and, therefore, denial of temporary relief was improper. Appellant asserts that the underlying controversy is actually between OSM and the Commonwealth of Kentucky concerning the efficacy of the 1982 statutory and regulatory amendments previously referred to.

[1] A party seeking temporary relief from enforcement action by OSM must show (1) "a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant," and (2) "that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources." Old Home Manor, Inc., 3 IBSMA 241, 246, 88 I.D. 737, 740 (1981). See also 43 CFR 4.1263. Judge Torbett ruled that the circumstances pleaded and testimony offered show that the alleged violation poses no likelihood of imminent environmental damage. However, it is his companion ruling that "it is highly unlikely that the Applicant [for temporary relief] will prevail in this case when it is finally determined" with which Shamrock disagrees.

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982), is a comprehensive statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." See 30 U.S.C. § 1202(a) (1982). The Act's principal regulatory and enforcement provisions are contained in Title V, which establishes a two-tiered regulatory program to achieve the purposes of the statute. The two tiers consist of an interim, or initial, regulatory program and a permanent regulatory program. 30 U.S.C. § 1251 (1982). Our focus here is on the application of the second tier, or permanent phase, to surface coal mining regulation in Kentucky.

During the permanent phase a state may assume primary jurisdiction over the regulation of surface coal mining on "non-Federal" lands within its borders through submission to and approval by the Secretary of the Interior of its proposed "State program." Kentucky received conditional approval of its State program on May 18, 1982. 47 FR 21404 (May 18, 1982). When a state program is approved, that state assumes the responsibility of issuing mining permits and for enforcing the provisions of its regulatory program. A state's jurisdiction for enforcement of an approved program is primary, but not exclusive, as argued by appellant. See In Re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980).

On the same day that Kentucky's permanent program was conditionally approved, the Kentucky legislature passed KRS 350.093 (1982), which initiated

a new program for deferment of surface coal mining reclamation requirements. This amended version of the statute and its implementing regulation were submitted to the Department of the Interior on May 28, 1982. 47 FR 31890 (July 23, 1982).

It is Shamrock's position that amendments to an approved state program are governed by section 505 of SMCRA, which states in part as follows:

> (a) No State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of the Act.
> (b) * * * The Secretary shall set forth any State law or regulation which is construed to be inconsistent with this Act. [Emphasis added.]

30 U.S.C. § 1255 (1982). Shamrock asserts that "it is obvious that Congress anticipated changes or amendments in the State program" under section 505. The requirements found in the Departmental regulation for amending a state program, it argues, are entirely inconsistent with the statutory procedures.

[2] Section 505 of the Act merely declares that state laws regulating surface mining must be consistent with and at least as stringent as SMCRA. See 1977 U.S. Code Cong. & Ad. News 593, 702. SMCRA does not specifically address procedures to amend approved state programs. Moreover, Shamrock's position overlooks the specific steps elaborated by Congress in section 503 of SMCRA, 30 U.S.C. § 1253 (1982), regarding approval by the Secretary of a state program. The process requires review involving the state, this Department, and other Federal agencies before the program may become effective. It would reasonably follow that procedures for adopting amendments would be as deliberate and exhaustive in order to satisfy the purposes of the Act. The position of the Secretary concerning this issue is reflected in 30 CFR 732.17, which provides at subsection (g) that: "No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment."

The Secretary was directed by Congress to implement the Act and was authorized to promulgate appropriate regulations which would provide the pertinent guidance. 30 U.S.C. § 1251(b) (1982). The regulation at issue, 30 CFR 732.17, elaborates the process formulated by the Secretary for amending a state program. Duly promulgated regulations have the force and effect of law and are binding on the Department. Sam P. Jones, 71 IBLA 42 (1983). The Board of Land Appeals has no authority to treat as insignificant or declare invalid the duly promulgated regulations of the Department. Id.

[3] Therefore, the position which Judge Torbett and this Board are obliged to accept is that any amendment to a state program not approved pursuant to 30 CFR 732.17 is not effective. Thus, the 1982 version of KRS 350.093 and 405 KAR 16:020 cannot be considered as having been part of the approved State program in March 1983, when the NOV was issued.

Appellant directs attention to 30 CFR 732.17(h)(12), which requires action on an amendment request within 6 months of its submission. Despite this clear pronouncement, it appears that review was not completed by January 1983, when the Secretary announced that consideration of the subject statute and regulation was still pending. However, the Secretary specifically warned that these proposed amendments were not enforceable by the State until approved. 48 FR 249 (Jan. 4, 1983). 3/

In the second part of its brief, Shamrock asserts that notice to the public and notice to the state, followed by a public hearing, are essential prerequisites to Federal enforcement of an approved state program. Its argument is based on an assertion that "Sec. 521(b) [of SMCRA] is the Federal enforcement section."

Inspector Saylor's enforcement action was conducted under 30 CFR 841.12(a)(2), which provides:

> When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or an exploration approval required by the Act or the State program which does not create an imminent danger or harm for which a cessation order must be issued under 30 CFR 843.11, the authorized representative may give a written report of the violation to the State and the person responsible for the violation, so that the appropriate enforcement action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized

---

3/ Kentucky's proposed amendments were accepted, albeit conditionally, by the Secretary on May 13, 1983, at 48 FR 21574. His approval was conditioned on Kentucky's submission of material to provide:

"1. Clarification that at all times the applicant for a reclamation deferral pursuant to KRS 350.093 section 2 has the burden of proof in establishing the need for such a deferral;

"2. Criteria that operators must meet in order to obtain such deferrals;

"3. A requirement that the applicant must demonstrate that (a) reclamation on the site is contemporaneous as of the request for deferral, and (b) the distance requirements of 405 KAR 16 section 2, regarding backfilling and grading requirements, will be met during the period of deferral.

"4. Re-evaluation of the bond on all deferrals issued to assure sufficiency thereof.

"Further, Kentucky must agree that all deferrals previously issued will be re-evaluated on the basis of this condition and, in the interim, the State will meet the terms of this condition as a matter of policy."

48 FR 21576 (May 13, 1983).

Under these conditions, Shamrock would not be eligible for a deferral permit under the approved amendments because the reclamation in question was not contemporaneous at the time of its request.

> representative may reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. 4/

The regulation at 30 CFR 843.12(a)(2) was promulgated pursuant to section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), providing in part for Federal oversight enforcement of individual violations of state programs "[w]henever, on the basis of any information available to him, * * * the Secretary has reason to believe that any person is in violation." (Emphasis added.)

The question of whether OSM has the authority to issue a NOV for a violation found as a result of an oversight inspection pursuant to section 521(a)(1) where the state fails to take action to ensure abatement has previously been considered by the Department. Deletion of the language in 30 CFR 843.12(a)(2), as not being authorized by SMCRA, was considered. See 46 FR 58467, 58473 (Dec. 1, 1981). Subsequently, the regulation was issued in final rulemaking in the present form recognizing authority for issuance of a NOV as a result of oversight inspections. 47 FR 35638 (Aug. 16, 1982). Finally, the Department issued a "Statement of Policy" by the Acting Assistant Secretary, Energy and Minerals, dated February 28, 1983. The statement, published in the Federal Register, held that SMCRA requires a Federal inspector to issue a NOV to an operator if a state has been notified of the existence of a violation and has failed to take appropriate action or show good cause for inaction within 10 days:

> Statement of Policy
>
> Upon examination of the issue, the Department has concluded that the regulation contained at 30 CFR 843.12(a)(2) was properly and lawfully promulgated; therefore there is no need to reconsider the issue.
>
> It is the Department's opinion, as set forth in the original preamble to 30 CFR 843.12, that "Congress did (not) intend OSM to sit idly by while * * * violations ripen into imminent hazards." 44 FR 15302, March 13, 1979. Rather as the preamble stated, the legislative history indicates that when "an OSM inspector discovered a violation at the mine, he must report the violation to the operator and the state and give the state 10 days to take appropriate action to require the operator to correct the violation. If the State takes such action, OSM does nothing further." 44 FR 15303. However, if the state fails to take adequate action or show good cause for such failure, OSM under 30 CFR 843.12 shall issue a notice violation.

48 FR 9199 (Mar. 3, 1983).

4/ The Federal inspections contemplated in paragraph (a)(1) of 30 CFR 843.12 include those conducted during Federal enforcement of a state program under section 521(b) of SMCRA. Thus, issuance of a NOV is authorized under 30 CFR 843.12(a)(2) for inspections conducted other than during Federal enforcement of a state program under section 521(b).

The enforcement provision referred to by Shamrock, on the other hand, pertains to Federal action where "the Secretary has reason to believe that violations of all or any part of an approved State program result from failure of the State to enforce such State program or any part thereof effectively." 30 U.S.C. § 1271(b) (1982). 5/ This scheme provides for notice and hearing prior to substituted enforcement by OSM. Application of section 521(b) requires a finding after notice and hearing that a state has not adequately demonstrated its capability and/or intent to enforce the state regulatory program. It does not appear that such a determination has been made in this case. However, this does not preclude issuance of a NOV where a violation is found as a result of an oversight inspection pursuant to 30 CFR 843.12(a)(2).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision to deny temporary relief is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

5/ Departmental regulations pertaining to Federal preemption of an approved state program where the Secretary determines that all or part of it is ineffectively enforced by the state are found at 30 CFR Part 733.